IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 27, 2007 Session

STATE OF TENNESSEE v. JERRY W. TULLOS

Direct Appeal from the Circuit Court for Bledsoe County
No. 60-2004 Buddy D. Perry, Judge

No. E2006-01833-CCA-R3-CD - Filed August 21, 2007

The defendant, Jerry W. Tullos, was convicted by a Bledsoe County jury of aggravated assault, a Class C felony, and was sentenced to four years imprisonment as a Range I offender. On appeal, he argues that: the prosecutor's closing argument was improper, the trial court erred in not giving the jury a charge on intoxication, the evidence was insufficient to support his conviction, and the trial court erred in sentencing him to four years in confinement. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Philip A. Condra, District Public Defender, Jasper, Tennessee, for the appellant, Jerry W. Tullos.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; J. Michael Taylor, District Attorney General; and James Pope, III, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

In July 2004, the defendant was indicted for attempted first-degree murder, Tenn. Code Ann. §§ 39-12-101; 39-13-202, and aggravated assault, *id.* § 39-13-102, against the victim, Robert Sharp. A trial was conducted on August 30th and 31st, 2006, from which we summarize the following testimony.

State's Proof

Officer Chris Rice with the Pikeville Police Department testified that he was dispatched to the Tullos residence on Nipper Street on April 16, 2004. When he arrived, Officer Rice retrieved his shotgun and entered the home. Once inside, Officer Rice saw the victim sitting on the floor in

the kitchen, "slumped over and bleeding, [and] not moving." The victim appeared to have been shot. Officer Rice also saw Kenny Lawson standing further into the kitchen toward the living room. When Lawson saw Officer Rice, he stuck his hands up in the air. Officer Rice then saw the defendant standing to the right of Lawson and holding a pistol. The defendant started to raise the pistol when Officer Rice entered the room. In response, Officer Rice ordered the defendant to drop the gun, and the defendant hesitated. Officer Rice racked his shotgun slide and prepared to fire. Deputy Jack Durham, who was behind Officer Rice, also had his weapon drawn. After Officer Rice prepared to fire, the defendant walked to the sofa and laid his gun down. Officer Rice covered Deputy Durham while Deputy Durham secured the defendant's weapon and handcuffed the defendant. The victim then started moving and talking, so realizing that he was alive, Officer Rice directed emergency medical personnel to come inside and get the victim. Officer Rice photographed the defendant's house and at trial noted that he found a gun holster lying on what he thought was the defendant's bed.

On cross-examination, Officer Rice stated that there was a big crowd of people, many with guns, when he arrived at the scene. The crowd dispersed, but Officer Rice later determined that one of the armed individuals was Randy Sharp. Officer Rice admitted that as far as he knew, the holster found in the bedroom had nothing to do with the case. Officer Rice also admitted that when the defendant started to raise his gun, he could have been trying to hand it over to the officer.

Deputy Jack Durham with the Bledsoe County Sheriff's Department testified that on April 16, 2004, he was dispatched to Nipper Street in response to a shooting. When he arrived, he saw a crowd of people who told him that the shooting had occurred inside Michael Tullos' house.[1] Deputy Durham entered the house behind Officer Rice and saw "a man slumped over the table in the floor." The man was not moving and showed no signs of life. Deputy Durham looked over and saw the defendant standing to his right with a gun in his hand. Officer Rice ordered the defendant to drop his weapon, but the defendant started to raise his arm. Officer Rice then racked his shotgun, and the defendant set his gun on the back of the sofa. Deputy Durham secured the defendant's weapon and handcuffed him. Deputy Durham also saw Kenny Lawson in the house, but he ducked out of the way when the officers entered the house. Deputy Durham noted that he smelled alcohol on the defendant's breath, and he determined that all three men appeared to have been drinking.

Chuckie Sharp, the victim's younger brother, testified that on April 16, 2004, he lived on Nipper Street across the street from the defendant. On that day, the victim visited Sharp[2] and then went to the defendant's house. Sharp noticed that the victim appeared to have been drinking but was not drunk. Sometime later, Sharp and his wife were standing outside in their yard when they heard a "pow" that sounded like a gunshot. After hearing the "pow," Sharp decided to go over to the defendant's residence. Sharp entered the house and saw Lawson sitting at the kitchen table and the

[1] The record reveals that the residence was owned by Michael Tullos, the defendant's brother, but the defendant also resided in the house.

[2] For clarity, Robert Sharp is referred to as "the victim," and Chuckie Sharp is referred to as "Sharp."

victim lying slumped over in the floor. Sharp noticed that the victim was not moving and displayed no signs of life, but he did not see any blood. Sharp then saw the defendant standing between the kitchen and living room with a gun in his hand. Sharp attempted to check on the victim to see if he was still alive; however, the defendant pointed the gun at him and told him to get out. Sharp left the house.

On cross-examination, Sharp stated that after he left the defendant's house, his other brother Randy went toward the defendant's house with a shotgun. On redirect-examination, Sharp clarified that he saw Randy with a shotgun after Sharp related to some bystanders what he had seen inside the defendant's house. Sharp said that he did not think Randy ever went into the defendant's house.

The victim testified that on April 16, 2004, the defendant rode with him to Dayton, Tennessee so the victim could submit some job applications. While in Dayton, the victim and the defendant stopped at a sports bar where they consumed three pitchers of beer. They then drove back to Pikeville and went to the defendant's house "to have a few drinks." The defendant had a full half-gallon of Jim Beam whiskey that he and the victim started to drink. The victim said that he and the defendant had not been in any type of argument that day. After a couple of hours, the defendant called Lawson and invited him over for drinks. Shortly after Lawson arrived, the victim left to pick up his daughter after school and drop her off at Sharp's house across the street. The victim then returned to the defendant's house, and the three men started "mixing drinks."

As the men proceeded to drink the half-gallon of Jim Beam over several hours, both the defendant and the victim became intoxicated. While they were sitting at the kitchen table, the victim asked Lawson for a light for his cigarette and heard the defendant say, "I['ll] show you." The defendant got up from the table, went down the hallway toward his bedroom, then returned to the kitchen and shot the victim under his right ear lobe. The victim had not heard the defendant return to the kitchen. The victim fell down right after hearing the shot, but he did not feel anything because he "was just out of it." Nevertheless, the victim was aware of the defendant walking around waving his gun and asking, "Where's Randy." The victim played dead because he was afraid of getting shot again.

The victim testified that the next thing he recalled was seeing the police walk into the room and hearing a shotgun racking. Thereafter, the victim was taken to the Bledsoe County Hospital and then airlifted to Erlanger Hospital in Chattanooga. While in flight, the paramedics had to put paddles on the victim's chest and jumpstart his heart. The victim was hospitalized for two days. The victim recalled that the bullet was lodged in his left shoulder, and he had to have it removed in a later surgery. The victim said that he had not threatened the defendant or made any gestures toward him prior to the shooting. The victim did not have a weapon at any time that day.

On cross-examination, the victim stated that he and the defendant probably drank about a gallon of beer at the sports bar in Dayton, but his ability to drive was not affected. The victim said that he and the defendant were at the sports bar for three or four hours. The victim admitted that he gave a statement to Special Agent David Emiren but said he did not tell Agent Emiren that he and the defendant had been arguing. The victim also did not remember telling Agent Emiren that he

believed he and the defendant were kidding around, or that the defendant said he was going to go get his gun. The victim explained that he spoke with Agent Emiren while in the hospital, and he may have said some things that were not true because he was on Morphine. The victim noted that he currently walked with a limp because of knee and hip injuries from playing football. The victim denied telling a group of the defendant's neighbors that he was as much to blame for the shooting as the defendant, but he did tell Mr. Angel, one of the neighbors, that he had thought about dropping the charges. The victim admitted that he was at the defendant's house within the past month, and he called defense counsel and said he was going to drop the charges and did not know what happened. The victim explained, however, that the defendant asked him "to say that." The victim acknowledged having previously been convicted of selling Schedule II drugs. On redirect-examination, the victim said that the defendant offered him $500 to drop the charges.

Kenny Lawson testified that the morning of April 16, 2004, the defendant and the victim stopped by his house to drop off the victim's daughter on their way to Dayton. Later that day, toward the evening, the defendant called Lawson and invited him over to have drinks with him and the victim. Lawson went to the defendant's house, and the three men sat around drinking and talking like usual. Lawson noted that the defendant and the victim were almost to the point of being intoxicated when he arrived. After about thirty minutes, the victim left to go pick up his daughter but then returned a short while later. The three men then engaged in normal conversation for another thirty minutes until the defendant said, "I'll show you," and got up from the table and went down the hall. Lawson could not see where the defendant went, but he recalled that the defendant's bedroom was in the back of the house, on the right-hand side. The victim was intoxicated by this point and the defendant appeared to be as well, but Lawson was not.

Lawson testified that he was checking his blood sugar, and the victim was lighting a cigarette while the defendant was down the hall. The next thing Lawson heard was a gunshot. When the shot sounded, Lawson saw the victim fall and the defendant standing with a gun. The victim was sitting on a stool with his back to the living room when he was shot. After the shot, Lawson jumped up and asked the defendant what happened, but the defendant was in a daze still holding the gun. The defendant told Lawson to call the police. Lawson could tell the victim was still breathing. About a minute later, Chuckie Sharp ran into the house wanting to know what was going on, and the defendant raised his gun at Sharp and told him "to get out." The defendant's sister also came into the house right after Sharp, and the defendant, while still holding the gun, told her to get out. Soon after the defendant's sister left, the law enforcement officers arrived.

On cross-examination, when confronted with a statement given to Agent Emiren a couple of days after the shooting in which he said that the defendant and the victim "like always . . . started to argue," Lawson clarified that he would not call it an argument. Lawson said that a lot of what was written in Agent Emiren's report was not written correctly even though Lawson initialed the statement. Lawson stated that the defendant and the victim were discussing women but not arguing. Lawson admitted that the defendant and the victim "cussed each other," but he said they cussed each other all the time. Lawson denied having told the defendant's brother that the defendant had told the victim three times to get out of his house. Lawson acknowledged that the victim and the

defendant had recently came to his house, and the victim had said that he did not want to go to court on this matter and that he was as much at fault as the defendant.

Charlotte Tullos, the defendant's sister, testified that on April 16, 2004, she went to the defendant's house and saw the victim lying face-down on the floor. Tullos saw the defendant with a gun in his hand "standing in the hallway and his eyes [were] going in the back of his head, . . . [and] covered up with white." Lawson told Tullos to "[g]et out, because it's not [the defendant]. I don't know what's happened, but it's not [the defendant]." On cross-examination, Tullos said that the defendant took medication for a number of physical ailments. Tullos stated that the victim had told her that the shooting was an accident.

At the conclusion of the state's proof, the defendant moved for a judgment of acquittal. The trial court granted the motion as to Count 1 – attempted first-degree murder and stated it would submit the lesser-included offense of attempted second-degree murder to the jury.

Defendant's Proof

Agent David Emiren with the Tennessee Bureau of Investigation testified that he was involved in the investigation of the April 16, 2004, shooting at the defendant's house. During the course of his investigation, Agent Emiren interviewed both Lawson and the victim, and he reduced what was said during the interviews to writing. Agent Emiren said that the victim looked "[p]retty rough," like he was in shock, when he interviewed him in the hospital. However, the victim was coherent but in and out of consciousness.

On cross-examination, Agent Emiren testified that he was present in the hospital when the doctor checked in on the victim. Agent Emiren heard the victim scream when the doctor tried to sit him up and also saw the wound. Agent Emiren noted that there was no gunpowder residue around the wound meaning that the shooter had been over three feet away.

Defense counsel made an offer of proof that would go to the defendant's self-defense claim. During the offer of proof, Agent Emiren testified that the defendant said he did not want to give a statement, but then made spontaneous utterances as Agent Emiren was trying to leave. Among the utterances, the defendant said that the victim "had whipped him before," and that he "can't go no further tha[n] my house."

Deputy Clerk Drucilla Burton testified that she had recently encountered the defendant and the victim at the courthouse together, and the victim told her that he did not want to go through with the trial. Burton stated that the victim had been drinking so she told him he needed to "go on home and just stop drinking."

Robert Angel testified that he lived next door to the defendant and on April 16, 2004, he heard sirens which caused him to go outside and see what was happening. Angel saw a large crowd around the defendant's house. Sometime after the shooting, the victim asked if he could stay at Angel's house, and the victim in fact spent the night at Angel's for ten to fifteen days. Angel recalled an occasion when the victim approached him and the defendant and said, "I'm going to

make it clear to you and [the defendant] that it was as much my fault as it was anybody's, whatever happened over there, and I am not going to see [the defendant] go to jail for something like that."

Following the conclusion of the proof, the jury found the defendant not guilty of attempted second-degree murder in Count 1, but found him guilty of aggravated assault in Count 2. After a sentencing hearing, the trial court imposed a four-year sentence in confinement.

ANALYSIS

On appeal, the defendant argues that the prosecutor's closing argument was improper, the trial court erred in not giving the jury a charge on intoxication, the evidence was insufficient to support his conviction, and the trial court erred in sentencing him to four years in confinement.

Closing Argument

The defendant argues that the trial court erred in overruling his objections to the state's closing argument. He asserts that the state's closing argument was improper in a number of ways.

It has long been recognized that closing argument is a valuable privilege that should not be unduly restricted. *See State v. Bane*, 57 S.W.3d 411, 425 (Tenn. 2001) (citing *State v. Bigbee*, 885 S.W.2d 797, 809 (Tenn. 1994)). However, closing argument "must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Middlebrooks*, 995 S.W.2d 550, 557 (Tenn. 1999). Notably, the scope of closing argument is subject to the trial court's discretion and will not be reversed absent a clear showing of abuse of discretion. *See State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1998); *Smith v. State*, 527 S.W.2d 737, 739 (Tenn. 1975).

This court in *State v. Goltz*, noted five general areas of recognized prosecutorial misconduct in closing argument:

> 1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
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> 2. It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. *See State v. Thornton*, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999); *Lackey v. State*, 578 S.W.2d 101, 107 (Tenn. Crim. App. 1978); Tenn. Code of Prof'l Responsibility DR 7-106(c)(4).
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> 3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. *See Cauthern*, 967 S.W.2d at 737; *State v. Stephenson*, 878 S.W.2d 530, 541 (Tenn. 1994).
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> 4. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or

> innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. *See Cauthern*, 967 S.W.2d at 737; *State v. Keen*, 926 S.W.2d 727, 736 (Tenn. 1994).
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> 5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

111 S.W.3d 1, 6 (Tenn. Crim. App. 2003) (citing Standards Relating To The Prosecution Function And The Defense Function §§ 5.8-5.9 Commentary (ABA Project on Standards for Criminal Justice, Approved Draft 1971)).

In measuring the prejudicial affect of an improper argument, this court considers the following factors: (1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecutor making the statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case. *See State v. Bough*, 152 S.W.3d 453, 463 (Tenn. 2004) (citing *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)).

The first instance of alleged misconduct occurred when the prosecutor "vouch[ed] for the credibility of the victim" by saying:

> And ladies and gentlemen, [defense counsel] wants to talk about . . . the statement [the victim] gave to [Agent] Emiren. You know, I don't know what the condition of [the victim] was. You heard the testimony, he was on morphine at the time he went and talked to [Agent Emiren] at the hospital, ladies and gentlemen, but the testimony that he wants [to] argue say[ing] that well, that's not consistent, that testimony, had [the victim] testified to it, would have helped me more. [The defendant] says, I'm going to blow your G.D. brains out and gets up and walks away. Doesn't that help [the victim's] case more? But [the victim] didn't get up here and say that. He got up and testified the way he remembered it, said, ["]I'll show you.["] That's what he testified to. I mean, if a man wanted to get up and lie, and tell a lie, he could have got up there and told me what he said in that while he was under morphine. That helps my case more. *But ladies and gentlemen, [the victim] told you the good, the bad and the ugly. He told the whole truth. He told you warts and all, whether it helped his case or hurt his case.*

(Emphasis added for clarification.)

Upon review, we note that even if the prosecutor's comment was improper, we cannot conclude it constitutes reversible error under the factors set out in *Judge*. The prosecutor made the statement in response to defense counsel's thorough cross-examination of the victim. *See Judge*, 539 S.W.2d at 344 (noting that the court takes into account whether the prosecutor's remark was made in response to a comment or argument of the defendant). During cross-examination, defense counsel questioned the victim regarding his recollection of the events, and the prosecutor's argument

offered an explanation for why the jury could believe the victim's testimony. The prosecutor did not personally attest that the victim was a credible person, but instead offered that had the victim wanted to lie, he could have lied to help his case more. The statement about "the truth" was very limited in light of the rest of the prosecutor's argument, and the trial court instructed the jury that it was its job to judge the credibility of the witnesses and that counsels' statements were not evidence.

The second instance of alleged misconduct occurred in rebuttal when the prosecutor said:

> [M]y job now is to rebut some of the things that [defense counsel] said, and I appreciate [defense counsel], he's a good lawyer, and he does a good job at what he does, but ladies and gentlemen, as good a lawyer [as] he is, *as good a spin as he can put on the facts*, he's got a tough row to hoe in this case, because the facts just don't add up for him and his client.
>
> Ladies and gentlemen, he wants to -- *it's a lawyer trick*, ladies and gentlemen . . . .

(Emphasis added.) After defense counsel objected, the prosecutor rephrased his comments.

After review of this instance of alleged impropriety, even assuming the prosecutor's statements were improper, we cannot conclude that the statements prejudicially affected the defendant's case. The record does not reflect that the prosecutor's intent in making the statement was to impugn defense counsel but instead to assert that the facts were against the defendant and to steer the jury back to the state's interpretation of the facts. Moreover, upon defense counsel's objection, the prosecutor rephrased his comments to clarify that it is a common strategy, not "trick," to attack the victim when the facts did not support one's case. Also, considering the relative strength of the state's case, we conclude that the prosecutor's statements did not affect the verdict to defendant's detriment.

The defendant lastly argues that the following was "improper on so many levels – deterrence, future criminal conduct, moral, not legal, judgment, and punishment" :

> [The victim] has a life sentence from his injuries that he will live with for the rest of his life. Let's not compound that, ladies and gentlemen, by letting this man walk. Is that the right thing to do? If what [the defendant], if you believe what [the defendant] did is the right thing to do, by all means you turn him loose, but ladies and gentlemen, if you believe what he did was wrong and he deserves punishment, he deserves deterrent, that he can't do this again to someone else, then, ladies and gentlemen you return - -

At which point, defense counsel objected. The court sustained the objection and instructed the jury that it was to decide the case on the facts and whether the facts proved beyond a reasonable doubt that the defendant committed any of the charged offenses. The prosecutor then continued, "Ladies and gentlemen, I'm asking for justice. That's all I'm asking. That's what I mean, if justice, if you

believe is turning this man loose, by all means do it." Defense counsel again objected, and the court again instructed the jury that it had to decide whether the proof established beyond a reasonable doubt that the defendant committed the offense.

Upon review, we note that although it was improper for the prosecutor to interject ideas of justice and deterrence in his closing argument, we cannot conclude that the prosecutor's statements necessitate reversal. The trial court sustained defense counsel's objections to this portion of the state's argument and immediately instructed the jury that it was to decide the case solely on the facts and whether the facts proved beyond a reasonable doubt that the defendant had committed the offenses. Moreover, the fact that the jury returned a not guilty verdict on the attempted second-degree murder charge tends to indicate that the state's argument did not inflame or otherwise prejudice the jury to decide the case on irrelevant grounds. Also, looking at the relevant strength of the state's case, we cannot conclude that the prosecutor's statements prejudicially affected the verdict to the defendant's detriment.

In sum, we conclude that none of the areas of alleged prosecutorial impropriety in closing argument, either singularly or cumulatively, were so inflammatory or improper as to prejudicially affect the verdict in the defendant's case. *See Middlebrooks*, 995 S.W.2d at 559; *Goltz*, 111 S.W.3d at 5. Therefore, the defendant is not entitled to relief.

Jury Charge

The defendant next argues that the trial court erred in failing to give the jury an instruction on intoxication. He asserts that his level of intoxication at the time of the shooting was such that he did not have the ability to form the knowing intent required for aggravated assault as charged.

Before the court was finished charging the jury, defense counsel requested, both orally and in writing, that the trial court give the jury an instruction on intoxication from Tennessee Code Annotated section 39-11-503. The court declined, stating, "[W]e've been here two days and everybody has known the intoxication levels in this case. I know it's the Court's responsibility, but I don't think it's appropriate to give it and I'm not going to."

It is fundamental that the trial court has a duty "to give a complete charge of the law applicable to the facts of a case." *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986); *see also* Tenn. R. Crim. P. 30. However, even if a trial court errs when instructing the jury, such instructional error may be found harmless. *State v. Williams*, 977 S.W.2d 101, 104 (Tenn. 1998). A charge is prejudicially erroneous only "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997). As a mixed question of law and fact, our standard of review for questions concerning the propriety of jury instructions is de novo with no presumption of correctness. *State v. Smiley*, 38 S.W.3d 521, 524 (Tenn. 2001).

Intoxication is generally not a defense; however, proof of intoxication, whether voluntary or involuntary, is admissible if such evidence is relevant to negate a culpable mental state. Tenn. Code Ann. § 39-11-503(a). In this case, we note that there was proof at trial indicating the defendant was intoxicated; however, we conclude that the trial court's failure to give an instruction on

intoxication was harmless because there was no proof that the defendant's intoxication prevented him from forming the requisite mental state. *See Harrell v. State*, 593 S.W.2d 664, 672 (Tenn. Crim. App. 1979) (stating that in addition to proof the defendant was intoxicated, there must also be evidence that the intoxication deprived the defendant of the mental capacity to form the necessary intent). The evidence showed that despite his drinking, the defendant was coherent enough to leave the kitchen, retrieve a handgun, return to the kitchen and shoot the victim. The evidence also showed that the defendant was coherent enough to tell Lawson to call the police after having shot the victim and to tell Chuckie Sharp and Charlotte Tullos to leave when they entered his house and tried to check on the victim. No evidence was offered as to the defendant's blood alcohol concentration near the time of the shooting, and the defendant's proof at trial centered on his contention that the shooting was in self-defense. In light of this evidence, we conclude that the trial court's failure to give an instruction on intoxication was harmless.

Sufficiency

The defendant argues that the evidence was insufficient to convict him of aggravated assault. Specifically, he asserts that it was not proven beyond a reasonable doubt that he acted "knowingly." We begin our review by reiterating the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); *see* Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

As charged in this case, "A person commits aggravated assault who . . . knowingly commits an assault as defined in § 39-13-101 and . . . [c]auses serious bodily injury to another; or [u]ses or displays a deadly weapon[.]" Tenn. Code Ann. § 39-13-102(a)(1). Assault is defined as intentionally, knowingly, or recklessly causing bodily injury to another; or intentionally or knowingly causing another to reasonably fear imminent bodily injury. *See id.* § 39-13-101(a). A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result. *Id.* § 39-11-106(a)(20).

In the light most favorable to the state, the proof showed that the defendant, the victim, and Lawson were sitting around the defendant's kitchen table drinking alcohol. The victim asked Lawson for a light for his cigarette, after which the defendant said, "I['ll] show you," and left the room. The defendant returned with a handgun and shot the victim behind his ear. The defendant then instructed Lawson to call the police. After the gunshot sounded, Chuckie Sharp and Charlotte Tullos both ran over to the defendant's house at separate times to see what had happened, and the defendant pointed the gun and said to get out. The victim was hospitalized for two days because of the gunshot and had to have the lodged bullet removed in a later surgery. Based on this evidence, the jury could conclude that the defendant knowingly assaulted the victim by using a deadly weapon.

Sentencing

A sentencing hearing was conducted on January 31, 2006, at which the only evidence introduced was the defendant's presentence report and a victim impact statement. After the parties' arguments, the trial court sentenced the defendant as follows:

> I'm still required to look at the mitigating and the enhancing factors and I'm going to give [defense counsel] credit that generally the list of factors that you stated as far as mitigating are concerned and particularly his mental health situation and general health situation are mitigating factors that should be considered by this Court and I'm going to put into the equation -- I['m] going to just reject the DA's contention that I should consider 4, 11, and 13. I'm going to apply only Number 2 and 7 and again now we're referring to the 2004, 40-35-114, . . . and I'm giving moderate weight to Number 7 in view of the fact that this is the offense of aggravated assault. Now, I understand the DA's argument that, well, this was one committed with a deadly weapon, therefore, you can pick up Number 7, but essentially we have an aggravated assault here and we could have gotten there either way, so I'm only giving moderate consideration to 7. I'm going to give considerable weight . . . to Number 2 and there's one aggravated assault that resulted in a conviction for an assault, there are numerous intoxicating cases and then there's the admission by [the defendant] as to criminal behavior involving the violence towards other folks and he was, in fact, forthcoming. . . . I think it's a reasonable inference from what he said is that there's just not any hesitation to use violence particularly when it's coupled with alcohol. I'm going to find based on that that I can move the sentence from the minimum of three years to a sentence of four years. I'm going to set the sentence at four years, but I think it's a sentence that's appropriately served in this case and I'm going to require it be served.

The defendant challenges both the length of sentence imposed by the trial court and the denial of an alternative sentence. This court's review of a challenged sentence is a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and

circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.

In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

Length of Sentence

As a Range I offender convicted of aggravated assault, a Class C felony, the defendant was subject to a potential sentence of three to six years. *Id.* §§ 39-13-102, 40-35-112(a)(3). Starting with the minimum in the range, the trial court should adjust the sentence length within the range as appropriate based upon the presence or absence of mitigating and enhancement factors set out in sections 40-35-113 and 40-35-114. *Id.* § 40-35-210(e).[3] The weight to be afforded an existing factor is left to the trial court's discretion so long as the court complies with the statutory sentencing guidelines and its findings are adequately supported by the record. *See State v. Souder*, 105 S.W.3d 602, 606 (Tenn. Crim. App. 2002).

Initially, we note that in light of the United States Supreme Court's decisions in *Blakely v. Washington*, 542 U.S. 296 (2004) and more recently in *Cunningham v. California*, --- U.S. ----, 127 S. Ct. 856 (2007), that the trial court's application of enhancement factor (7), that the injuries inflicted upon the victim were particularly great, Tenn. Code Ann. § 40-35-114(7), is problematic because such factor was not found by the jury or admitted by the defendant. Nonetheless, the defendant's presentence report shows that the defendant had a prior conviction for assault, two for driving under the influence, two for public intoxication, violation of the driver's license law, and contempt of court. The presentence report also indicates that the defendant admitted to the presentence officer that in the past he had shot at another man and pulled a knife on the victim's brother. The defendant told the officer that there may be other people he had shot at or pulled a knife on but not remember because of his being intoxicated. We conclude that the application of enhancement factor (2), the defendant's history of criminal convictions and criminal behavior, Tenn. Code Ann. § 40-35-114(2), does not violate *Blakely* and was entitled to sufficient weight to justify the enhancement of the defendant's sentence.

Manner of Service

A defendant is presumed to be a favorable candidate for alternative sentencing if he is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). A defendant is eligible for probation if the actual sentence imposed is eight years or less and the offense for which the defendant is

[3] We utilize the statutes in place at the time of the offense, April 2004.

sentenced is not specifically excluded by statute.[4] *See* Tenn. Code Ann. § 40-35-303(a). The trial court shall automatically consider probation as a sentencing alternative for eligible defendants; however, the defendant bears the burden of proving his or her suitability for full probation. *See id.* § 40-35-303(b). No criminal defendant is automatically entitled to probation as a matter of law. *See State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would serve the ends of justice and the best interests of both the public and the defendant. *See State v. Souder*, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002). Among the factors applicable to probation consideration are the nature and circumstances of the offense; the defendant's criminal record; his background and social history; his present condition, including physical and mental condition; and the deterrent effect on the defendant. *See State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999).

In determining a defendant's suitability for a non-incarcerative sentencing alternative, the court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Id. § 40-35-103(1)(A)-(C). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. *Id.* § 40-35-103(5). Additionally, if the serious nature of the offense forms the basis for imposing a sentence of confinement, the "circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring a sentence other than confinement." *State v. Grissom*, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997) (internal quotations omitted).

The record does not indicate that the trial court specifically considered the principles of sentencing in determining the manner of service of the defendant's sentence. However, a purely de novo review supports the conclusion that confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct. Tenn. Code Ann. § 40-35-103(1)(A). The presentence report shows that the defendant has at least seven misdemeanor convictions as well as other admitted criminal conduct and violent behavior for which he was not charged. For two of his convictions, the defendant received suspended eleven month, twenty-nine day sentences, yet those

[4] For crimes committed on or after June 7, 2005, sentences of ten years or less are eligible to be served on probation if not specifically excluded by statute.

efforts at alternative sentencing apparently did not work as he ended up with the present conviction. As such, it was proper for the trial court to order that the defendant serve his sentence in confinement.

CONCLUSION

Based on the foregoing reasoning and authorities, we affirm the judgment of the Bledsoe County Circuit Court.

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J.C. McLIN, JUDGE